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Arrests in Civil Disturbances: Reflections on the Use of Deadly Force in Riots

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ARRESTS IN CIVIL DISTURBANCES: REFLECTIONS ON THE USE OF DEADLY FORCE IN RIOTS

HENRY W. McGEE, JR.*

There is no reason for this lawlessness and immorality. An arsonist is a murderer and should be shot right on the spot.

Chicago Mayor Richard J. Daley
April 15, 1968

Political power grows out of the barrel of a gun.

Mao Tse-Tung
November 6, 1938

I. Strategies of Containment v. Shooting To Kill

In October 1795, a 26-year-old French brigadier general of Corsican birth scattered riotous Parisians by firing "whiffs of grapeshot" point-blank into their midst. The ensuing carnage restored temporarily a measure of tranquility to Paris streets, and a grateful but intimidated Thermidorean Convention, under threat of seige by alienated citizens until canon stilled their protests, acquiesced in the Corsican's self-appointment as its protector. From the distance of nearly two centuries, there is a certain efficiency to Napoleon's brutality, and measured by the violence of the milieu in which it was operative, it is not without moral ambiguity.

But something more sophisticated than volleys of gunfire is required in the America of 1968 if the spontaneous, recurrent communal rioting of alienated black urban masses is not to become protracted guerilla warfare. When the mass hysteria that seizes a community caught in the throes of civil disorder has dissipated, the looter and the arsonist clearly enjoy no measure of prestige in a community ravaged by violence. But, should law enforcement agencies rely on massive firepower to quell rioting, they will appear as the instruments of one class for the oppression of another. Excessive force by police may transform individuals who would otherwise be criminals into martyrs and folk heroes. It is clear that genuine order of lasting duration can only be restored with the assent of the community, since law enforcement rests ultimately upon the tacit consent of the citizenry. "The true source of police

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strength in maintaining order lies in the respect and good will of the public they serve."[1]

It is critical to distinguish mass breakdown in respect for, and fear of, the law from isolated, single transgressions. Police have hitherto been trained to operate in a context in which the lawbreaker stands not only opposed to the law enforcement authority, but to the community itself. In such situations, the police can rely at least upon the passivity of the community, if not upon its cooperation in the criminal's apprehension. Deadly force used against a lone felon may even evoke approval of citizens bred in a "cops and robbers" culture. Deadly force used against large numbers of citizens, who just prior to the riots were for the most part law-abiding and peaceful,[2] can have crushing social consequences. To see a rebellious black citizenry as criminals multiplied endlessly is to miss the point, and to analogize from the more traditional forms of looting that often flow in the wake of natural disasters is to oversimplify.[3]

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1. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 272 (1968) [hereinafter cited as the KERNER COMMISSION REPORT].

2. Characteristically, the typical rioter was not a hoodlum, habitual criminal or riffraff; nor was he a recent migrant, a member of an uneducated underclass, or a person lacking broad social and political concerns. Instead, he was a teenager or young adult, a lifelong resident of the city in which he rioted, a high-school dropout—but somewhat better educated than his Negro neighbor—and almost invariably underemployed or employed in a menial job. He was proud of his race, extremely hostile to both whites and middle-class Negroes and, though informed about politics, highly distrustful of the political system and of political leaders.

KERNER COMMISSION REPORT 64. A study of the National Advisory Commission on Civil Disorders released in late July 1968 reinforced the earlier conclusions of the Commission:

Our analysis reveals that the riot arrestees . . . were not predominantly the riffraff elements, but were representative of the young adult Negro males in the urban ghetto. . . . The overwhelming majority of rioters are employed. About three-fourths of the arrestees were found to be employed. . . . Although from 40 to 90 per cent of the arrestees had prior criminal records, the criminal element was not found to be overrepresented. For criminologists estimate that from 50 to 90 per cent of the Negro males in the urban ghetto have criminal records. Thus to label most rioters as criminals is simply to brand the majority of Negro males in the urban ghettos as criminals.

N.Y. Times, July 28, 1968, at 48, col. 2.

And, of that great watershed in American history, the Watts revolt (often euphemistically described as a "riot") of 1965, it was said: "The fact remains that hundreds of others who ran with the mob had never been in trouble with the police." COHEN & MURPHY, BURN, BABY, BURN! THE LOS ANGELES RACE RIOT—AUGUST, 1965, at 256 (1966). The authors also adduced the statistics of the commission appointed by California Governor Brown to investigate the uprising: " 'Of the adults arrested, 1,232 had never been arrested before; 1,164 had a "minor" criminal record. . . . Of the juveniles arrested, 257 had never been arrested before; 212 had a "minor" criminal record; 43 had a "major" criminal record.' " *Id.* at 318.

3. Speaking of the disorders in Chicago on April 5, 6 and 7, 1968, after the assassination of Dr. King, Joseph I. Woods, Sheriff of Cook County, compared the situation to that which obtained in the Chicago suburb of Oak Lawn struck the year before by tornadoes. "I don't think the rioters would have a prayer if they came to the suburbs. The suburban police departments are now in a position to meet force with superior force," the sheriff reportedly stated. "[The rioters] wouldn't have done that looting in Chicago had it been part of my responsibility . . . . We proved this in Oak Lawn when we were called in last year. As soon as our men were in position, we made it absolutely clear that the first

Happily, some city administrators have relied on brain rather than fire power to meet the challenge of widespread disorder and violence. Cleveland Mayor Carl Stokes' withdrawal of National Guard troops and white policemen who had been dispatched to restore order after a "shoot out" between black militants and police on the city's East Side in late July 1968 was widely credited with halting further death or injury. Although 10 persons were killed and 15 wounded in the initial battle between the police and a band of citizens armed with the latest in high-powered rifles, there were no deaths, injuries, or shooting incidents during the 24-hour citizens' patrol led by black leadership in the city's Glenville-Hough areas following the initial outbreak of violence. By responding with imagination rather than brute force, the Mayor was able to prevent the spiralling escalation of death and destruction that had characterized previous riots in Cleveland and elsewhere.[4]

Unless civil war or genocide[5] is to be America's ultimate tragedy, law enforcement authorities must reject the indiscriminate application of deadly force and accept instead strategies of containment and dispersal in riot control.[6] During the upheaval in Chicago that followed Dr. King's murder, Chicago police pursued, with a few tragic exceptions,[7] a policy of containing the outbreak of arson and looting to

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act of looting would be met immediately with overwhelming force. The hoodlums simply went home to bed." Chicago American, April 16, 1968, at 4.

4. N.Y. Times, July 25, 1968, at 1, col. 4. Mayor Stokes also demonstrated flexibility by ordering the National Guardsmen to return to some of the strife torn areas to protect stores from looting and by imposing a curfew. In these moves he apparently enjoyed the support of community leaders, one of whom stated that the immediate concern of the patrols was "to prevent death and minimize destruction." N. Y. Times, July 26, 1968, at 1, col. 4. The citizens' patrols, while unable to control widespread looting by teenagers, were able to, in Stokes' words, "quell tensions." *Id.*

5. The spectre of a "final solution" to the Negro question begins to surface in the fiction of the day. A recent work by a black writer, which is partly protest, partly Ian Fleming, relates a plan for extermination known as "King Alfred." WILLIAMS, THE MAN WHO CRIED I AM (1967).

6. Mayor Stokes also placed a quarantine on the riot-torn sections of Cleveland, allegedly at the request of black leaders who asked him "to cordon off the vast area in the Glenville and Hough sections of the city, to keep outsiders from traveling through." N.Y. Times, July 25, 1968, at 24, col. 1.

7. Predictably, some policemen apparently shot and killed without waiting for official pronouncement. As usual, all the fatalities in the Chicago riot were black—males ranging in age from 16 to 34. Police admitted killing one of the men in an exchange of gunfire. Five others also appear to have been victims of massive police shooting, although a commission appointed by Chicago Mayor Daley put the number at four. The "blue ribbon" group of 11 prominent citizens, headed by a federal judge and former county prosecutor, reported that "four of the nine persons killed on the West Side may have been the victims of shots fired by task force policemen into stores and alleys." Chicago Sun-Times, August 6, 1968, at 2. *See also* N.Y. Times, August 6, 1968, at 40, col. 5.

Among eyewitness accounts was the following: "The police couldn't stop people from looting," said Charles Hampton, owner of a record store in the heart of one of the major riot areas. "There were too many people. I saw three or four [policemen] standing in front of Maybrooks (a store across the street from his establishment) and shooting directly into

as small a section of the black ghettos as possible. Despite the impression given to the contrary by the "Monday morning quarterbacking" of the city's mayor, who asserted that the Chicago police commissioner had failed to implement his "shoot to kill" orders,[8] it was self-evident to anyone even slightly informed on the dynamics of decisionmaking in Chicago that the relative inaction of the police during the initial hours of the outbreak of violence was a deliberate move by the city administration to surround and cut off the areas immediately involved in the hope that things would "blow over." To be sure, much of the inaction was due to the impotence of isolated policemen confronted with literally thousands of teenagers. But the reason so few policemen were actually at the scene of the mass looting was that the department imposed a wall of blue between Chicago's west side black ghetto and the business district known as the "Loop," which adjoins it to the east.[9] Additional numbers of police were held in reserve to stem any mass black invasion of white areas north of the riot zone.

Police Superintendent James B. Conlisk, Jr., enjoys no more autonnomy than any other city administrator, and only the naïve would believe that the Mayor was unaware of the initial hands-off policy during the first hours of the disorder. For instance, a Chicago newspaper made what it described as a "detailed" study of police records for the period between 1 p.m. Friday, April 5, and 7 a.m. Saturday. Of 445 arrests in those first hours of disorder, 75 percent were made after 5 p.m. Friday and less than 10 percent were made prior to 3 p.m. But, by 4 p.m. Friday, the core area of the riot zone was going up in flames.[10]

In any case, individual policemen caught in the human maelstrom that swiftly engulfed much of Chicago's west side ghetto could either shoot to kill (as some apparently did)[11] or take the position of an Alabama supreme court justice who long ago declared: "It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a willful homicide in order to prevent the larceny of an ear of corn."[12] And undoubtedly there were police supervisory personnel who took the stance of the Commander of the Maryland National Guard, who

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it. Then I saw one man carried out on a stretcher." Chicago Sun-Times, April 15, 1968, at 1.

8. At a press conference on April 16, 1968, Mayor Daley, criticizing his police superintendent, said that prior to the riots he had told the head of the police force that he wanted the police to "shoot to kill" arsonists and "shoot to cripple" looters. The Mayor said he did not learn the orders were not issued until after the disorders were put down. Chicago American, April 15, 1968, at 1.

9. The deployment of police, with its consequential undermanning of the ghetto neighborhoods, was criticized by the Mayor's riot commission. N.Y. Times, August 6, 1968, at 40.

10. Chicago Daily News, April 29, 1968, at 1.

11. *See* note 7 *supra.*

12. Storey v. State, 71 Ala. 329, 341 (1882).

declared: "I am not going to order a man killed for stealing a six-pack of beer or television set."[13]

Moreover, department policy, enunciated in an order of Superintendent Conlisk's celebrated predecessor, Orlando W. Wilson, clearly limited the permissible employment of deadly force:

III DEPARTMENT POLICY

A. Force likely to cause death or great bodily harm will not be used in instances where there is a likelihood of serious injury being inflicted upon persons other than the person against whom the officer is authorized by law to use such force.

B. The use of firearms will not be resorted to in instances where the consequences of such use would be likely to outweigh the police purpose served by such use. However, the immediate safeguarding of the life of the officer or a third party shall outweigh all other considerations.

C. The following practices are specifically forbidden:
   1. Firing into crowds.
   2. Firing over the heads of crowds except on specific order of a member above the rank of captain.
   3. Firing at a fleeing car except one in which a person who has attempted or committed a forcible felony is riding.
   4. Firing warning shots in the case of individuals where the use of deadly force is not permitted. (Even when deadly force is permitted, warning shots will not be fired when they are likely to injure persons other than those against whom deadly force is authorized.)
   5. Firing into buildings or through doors when the person fired at is not clearly visible.[14]

In a teletype message sent to commanding officers within hours of the Mayor's blast following the riots, the Wilson policy was redefined by Conlisk without substantial departure:

To Commanding Officers:

1. Arson, attempted arson, burglary and attempted burglary are forcible felonies.
2. Such force as is necessary, including deadly force, shall be used to prevent the commission of these offenses and to prevent the escape of perpetrators.
3. Commanding officers will insure that the above and General Order 67-14 is continually reviewed at all roll calls . . . .[15]

13. KERNER COMMISSION REPORT 176; *see* N.Y. Times, April 17, 1968, at 1, col. 2 (remarks of Mayor Lindsay).

14. Chicago Police Department General Order No. 67-14, May 16, 1967. Section I and II (not quoted) expressed the purpose of the order and summarized the law upon which it was based. Wilson, now in retirement in California, was quoted as saying that the furor that resulted from Mayor Daley's "shoot to kill" declaration stemmed from "an incredible misunderstanding . . . . Some people think this has come out as shooting in lieu of arrest. I'm certain the mayor does not propose this, but is speaking of using deadly force in effecting lawful arrests." Chicago Sun-Times, April 17, 1968, at 3.

15. Chicago Police Department teletype communication No. 14547, April 15, 1968

Therefore, to the extent individual Chicago policemen "shoot to kill," they do so at the risk of transgressing department policy and, as will be discussed, subject themselves to civil and criminal liability.[16]

If the Nation is no more disposed to meaningful racial accommodation than the previous history of race relations indicates,[17] civil disorders must be expected as a depressing fixture on the American social scene for the foreseeable future. While the riots serve no legitimate revolutionary purpose and are not in themselves viable strategies to accomplish the necessary reconstruction of the American social order,[18] they nevertheless will continue, like great spasms of agony, to convulse ghetto and urban life until the all-pervasive racism which dehumanizes black men is dissipated.[19]

As a chilling reality of contemporary life, law enforcement agencies must learn to "live with" racial violence. They must learn to implement policies and to devise techniques that will reduce, rather than escalate, the level of violence; localize and contain, rather than spread, conflict and disorder. Strategies bottomed on "meeting force with force," "shooting to kill," and so forth are strategies that, questions of humanity to the side, are likely to be counterproductive.

Thus far, the majority of the victims of rioting have been black—too many of them victims of excessive violence by law enforcement personnel.[20] Before the recent outbreak in Cleveland, the black sniper had proven to be largely mythical or, where he did exist, a fairly poor shot.[21] But any sharp increase in black deaths, any planned summary

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(issued "by order of" Superintendent Conlisk). The third paragraph expressly incorporates the Wilson general order set out previously, note 14 *supra*. The emphasis on arson stems from the Mayor's excitement over this issue as evidenced by the statement quoted at the beginning of this article.

16. Text accompanying note 42 *infra*.

17. The KERNER COMMISSION REPORT 265 concludes with an excerpt from the testimony of the sociologist, Dr. Kenneth B. Clark:

> I read that report * * * of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of 1935, the report of the investigating committee on the Harlem riot of 1943, the report of the McCone Commission on the Watts riot.
>
> I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction.

18. The most skillful analysis (and dissection) to date of the notion that riots and disorder are a first stage in urban guerilla warfare may be found in CRUZ, THE CRISIS OF THE NEGRO INTELLECTUAL (1968).

19. As Dr. Clark observed in a book written before he was called by the Kerner Commission as a witness: "The dark ghetto's invisible walls have been erected by white society, by those who have power, both to confiine those who have *no* power and to perpetuate their powerlessness. The dark ghettos are social, political, educational, and—above all—economic colonies. Their inhabitants are subject peoples, victims of the greed, cruelty, insensitivity, guilt, and fear of their masters." CLARK, DARK GHETTO 11 (1965). *See also* KERNER COMMISSION REPORT: "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities . . . ." *Id.* at 91.

20. *See* KERNER COMMISSION REPORT 36-37, 67.

21. *Id.* at 180, 271. A grim incident involving entertainer Dick Gregory illustrates in a vivid way the notion that trained black snipers lurk in ghetto shadows ready to cut

execution of rioters, is likely to trigger a response in kind.[22] A policy of riot control which rests on firepower is a policy which has as its foreseeable end an asphalt graveyard littered with black and white corpses.

II. The Legal Limits of Deadly Force in Arrests

In saner times, it might have been both a homily and a truism to declare that the police have the duty to arrest, but not to summarily dispatch. Today's passions decree not only the affirmation but the explication of first principles—one of which is that a policeman is neither judge nor executioner. The thought finds expression in an Illinois statute:

> A peace officer . . . is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:
>
> (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
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> (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.[23]

Enacted in 1961 in a sweeping reform and recodification of Illinois criminal law, the statute is much like the one it replaced[24] except that

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down the white enemy. During the Watts riot, Gregory walked up and down a street with a bull horn in a futile attempt to calm an angry throng. Shots rang out, and Gregory was hit in the thigh. Gregory, the police, and others who had been trying to restore peace ducked behind cars. Despite entreaties of officers to "stay down, stay down," Gregory calmly walked to a fence opposite the police cars and disarmed his assailant, who was standing behind a barricade with a rifle in his hands. "You shot me once. Now get off the street," Gregory ordered. The sniper apologized and, with the rest of the crowd, calmly left the scene. Cohen & Murphy, *supra* note 2, at 120.

22. "The more oppressive a police department becomes, the greater is our desire to resist to the point where we don't care whether we live or die any longer. . . . If he [Daley] uses this kind of treatment, he's going to get some return gunfire. To shoot a 17-year-old kid for stealing a six-pack of beer—I think it is immoral." Milwaukee, Wisconsin priest, James E. Groppi, N.Y. Times, April 18, 1968, at 40, col. 4.

Speaking of assaults on a civil rights worker in Mississippi, Malcolm X once said: "Let's learn [the white man's] language. If his language is with a shotgun, get a shotgun. Yes, I said if he only understands the language of a rope, get a rope. But don't waste time talking the wrong language to a man if you want to really communicate with him." Malcolm X Speaks 108 (Breitman ed. 1965).

23. Ill. Rev. Stat. ch. 38, § 7-5(a)(1)(2) (1964).

24. Law of March 27, 1874, div. 1, § 150, [1874] Ill. Rev. Stat. 348 (repealed 1961), which read:

> If any officer, in the execution of his office, in a criminal case, having legal process, be resisted and assaulted, he shall be justified if he kill the assailant. If an officer

it speaks in terms of forcible felonies and stresses danger to others as the arbiter of the use of deadly force.

Hans Mattick has pointed out that the "ambiguity" of the riot situation, and the problems of perception that flow therefrom, often make it difficult, if not impossible, for the police to separate with certainty lawful from unlawful conduct.[25] The problem is compounded when the policeman has to decide whether a felony or a misdemeanor has been committed, since the degree of force that he can use in making the arrest or preventing escape depends on such a judgment. Deadly force cannot be used to apprehend a misdemeanant. A lucid exposition of the legal principles governing the highly fluid situation that often obtains when an arrest is underway was given by Supreme Court Justice Brennan when he sat on the New Jersey Supreme Court:

> In his notable opinion in *Palsgraf v. Long Island R. Co.* . . . Mr. Justice Cardozo said that "some acts, such as shooting are so immediately dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer." . . .
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> No exception from this strict rule of accountability for want of extraordinary care in the use of firearms is made in favor of a police officer whose act of shooting causes harm to innocent bystanders. A police officer is not even justified in shooting at every escaping criminal to prevent the escape. At the common law it was only when the escaping criminal had committed a common law felony and there was no other way of taking him that the peace officer was justified in shooting at him to prevent his escape . . . . The law does not countenance the act of a police officer in shooting a fleeing offender charged merely with a misdemeanor, breach of the peace or violation of the Disorderly Persons Act, and the peace officer who shoots such a fleeing offender subjects himself to civil liability to the offender and to criminal prosecution as well.[26]

Deciding that a verdict for a policeman who accidentally shot a

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or private person attempt to take a person charged with treason, murder, rape, burglary, robbery, arson, perjury, forgery, counterfeiting or other felony, and he be resisted in the endeavor to take the person accused, by reason of such resistance, he be killed, the officer or private person so killing shall be justified: Provided, that such officer or private person, previous to such killing, shall have used all reasonable efforts to take the accused without success, and that from all probability there was no prospect of being able to prevent injury from such resistance, and the consequent escape of such accused person.

Except for successive additions of certain crimes, this statute has been on the Illinois "books" since 1827.

25. Chicago Sun-Times, April 16, 1968, at 5.

26. Davis v. Hellwig, 21 N.J. 412, 415-16, 122 A.2d 497, 498-99 (1956). The case is in line with an overwhelming majority of jurisdictions which decree that a policeman may not shoot to apprehend a misdemeanant or prevent his escape. The general stance of the courts is reflected in Tuttle v. Forsberg, 331 Ill. App. 503, 73 N.E.2d 861 (1947), which said: "It is unfortunate that a few police officers have a false conception of the power of their office and sometimes exercise their duties in an arbitrary and illegal manner." *Id.* at 510, 73 N.E.2d at 864.

bystander should be set aside because no account was taken of the admitted failure of the officer to ascertain danger to anyone except those in the direct line of fire, Justice Brennan quoted with approval language from a North Carolina decision that held that the mistaken belief that the escapee was a felon was no defense: " 'It is universally held that an officer has no right to kill one who merely flees to avoid arrest for a misdemeanor or to effect an escape from such arrest, even though it may appear that by no other means can the accused be taken or recaptured. * * * It is better that he be permitted to escape altogether than that his life be forfeited, while unresisting, for such a trivial offense.' "[27] Shortly before noon in a busy Newark shopping area, defendant officer Hellwig chased a shoplifter from a department store and up a narrow street filled with shoppers. When the thief refused to obey the command to halt, Hellwig fired "real low" at the thief's leg in order to stop him. The deflected bullet struck a teenage girl, who was on the street but not in the line of fire. The New Jersey Supreme Court, however, refused to find the defendant guilty as a matter of law, even though it developed that the theft was of liquor and a suit of clothes valued at $36.57—a misdemeanor in New Jersey. Justice Brennan reasoned that, since the thief might also have been prosecuted for the high misdemeanor[28] of entering a building with intent to steal, Hellwig might have been justified in shooting and that it was therefore a jury question as to whether he had exercised the requisite degree of care. Actually, Brennan's decision not only illustrates the law's abhorrence of the use of deadly force in the arrest of a misdemeanant, but also the problems that inhere when deadly force is used in a context in which bystanders are placed in jeopardy. Policemen cannot use deadly force to arrest misdemeanants; against felons they must use a degree of care that almost requires "prevision."

While deadly force is generally permitted where necessary to prevent the commission of a felony or to apprehend its perpetrator, the law has progressively narrowed the limits within which a policeman may legitimately exercise the power to shoot. Thus the *Restatement of Torts* acknowledges that, if the officer "reasonably believes that the arrest cannot otherwise be effected," he may use deadly force in the arrest of a felon.[29] However, this terse statement is followed by a comment which clearly reflects the sense of the decisions that deadly force is, in the final analysis, a last-resort proposition, not a shoot-first-ask-questions-later matter.

The use of force intended or likely to cause death for the purpose of

27. 21 N.J. at 417, 122 A.2d at 499 (quoting from Holloway v. Moser, 193 N.C. 185, 189, 136 S.E. 375, 377 (1927)).

28. In New Jersey, for the purposes of the use of deadly force, the common law distinction between felonies and misdemeanors is maintained as the statutory distinction between high misdemeanors and misdemeanors. 21 N.J. at 419, 122 A.2d at 500.

29. RESTATEMENT (SECOND) OF TORTS § 131, at 233 (1965).

> arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means. If it reasonably appears to the actor that the arrest can be otherwise effected, the use of such force is excessive . . . .
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> The interest of society in the life of its members, even though they be felons or suspected of felony, is so great that the use of force involving serious danger to them is privileged only as a last resort when it reasonably appears to the actor that there is no other alternative except abandoning his attempts to make the arrest. Therefore, in determining whether the use of such force is privileged, the actor has not the same latitude of discretion which is permitted to him in determining whether it is necessary to use force which is intended or likely to cause less serious consequences.[30]

While the *Restatement* has expressed the general position taken in most decisions, as well as by major commentators,[31] the *Model Penal Code* has articulated reasonably precise guidelines for the employment of deadly force. The *Code* would restrict the use of deadly force to felonies in situations where the officer believes that the force creates no "substantial risk of injury to innocent persons."[32] The felony would have to be one which involved conduct that included the use or threatened use of deadly force, or else, if deadly force were not employed, there would have to be a "substantial risk that the person to be arrested [would] cause death or serious bodily harm if his apprehension [were] delayed."[33] In addition, the officer would be required to make known the purpose of the arrest, unless he believed that either the person to be arrested already knew or could not reasonably be informed.

Moreover, deadly force is not likely to stand judicial scrutiny unless a forcible felony has been involved, even when there is an assertion of self-defense by the defendant officer.[34] The justification for the use of force is to protect life—not to risk it. As one writer has observed, "The principal objection is that many felonies do not endanger life, so that force which might result in death should not be authorized in

30. *Id.*, Comment *f*, at 235. In a caveat the framers of the restatement expressed no opinion about the privilege to use deadly force to effect arrest for a misdemeanor that involved danger of death or serious bodily harm—thereby implicitly recognizing the artificiality of labeling crimes misdemeanors or felonies, and also the absurdity of permitting deadly force to prevent, for example, embezzlement, or to stop a forger from escaping.

31. "No more force than is reasonably necessary may be used to effect an arrest and the officer is liable for injury caused by an excessive force. . . . Deadly force may be used, however, if reasonably necessary to arrest for the type of felony which normally endangers the life and safety of others. Not every felony belongs to this category of dangerous crime." 1 HARPER & JAMES, TORTS § 3.17, at 273 (1956) (footnotes omitted); *accord*, PERKINS, CRIMINAL LAW 875-77 (1957).

32. MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

33. *Id.*

34. *See* Champion v. State, 35 Ala. App. 7, 44 So. 2d 616 (1949).

order to bring about arrests for such felonies."[35] And of special relevance to civil disorders is the position of most jurisdictions that the officer must have reasonable grounds to believe that a felony has been committed and that the arrestee is the felon.[36] Mere suspicion will not suffice, and some courts have even imposed absolute liability and resolved the mistake in fact against the policeman.[37] Much of the conduct in a civil disorder is highly visible crime. But not all the erratic behavior unleashed by the hysteria that engulfs a riot-torn community can be neatly adjudicated on the spot as felony or misdemeanor. Undoubtedly, much of the shooting indulged in by law enforcement authorities would not have been perpetrated in calmer times. Indeed, as the *Kerner Commission Report* makes painfully clear, one of the first casualties in any disorder is likely to be common sense and reasonableness of the police.

The use of excessive force by policemen in ghetto communities is one of the burning issues of the day. While every community has its share of "horror stories," the shooting of a black high school honor student and captain of the football team graphically illustrates the wisdom of the law's restriction on the use of deadly force. On September 3, 1967, the youth, Kenneth Alexander, was shot in the back of the head by a policeman in the presence of three companions. The policeman asserted that he called to the boys to come to him, saw a "glint" in the hands of one of the youths, and then stumbled and accidentally discharged his gun. After enormous community pressure, the case was taken to the grand jury, which refused to indict, terming the shooting accidental. The verdict was rendered even though the witnesses closest to the shooting testified that the officer took deliberate aim.[38]

III. Excessive Force and Legal Liability

Theoretically, the errant and brutal policeman must answer both civilly and criminally for his excesses. An abundance of decisions support the right of an injured party or, as is so often tragically the case, his representative to bring an action sounding in tort.[39] And of more seriousness, especially for the policeman, is the possibility of conviction

35. La Fave, Arrest 213 (1965). The author makes the point, however, "that some misdemeanors involve such risks, and that consequently deadly force should be allowed in such cases." *Id.*

36. *See generally* Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Hubbard v. State, 202 Miss. 229, 30 So. 2d 901 (1947); Coldeen v. Reid, 107 Wash. 508, 182 P. 599 (1919).

37. Commonwealth v. Duerr, 158 Pa. Super. 484, 493, 45 A.2d 235, 239 (1946), wherein the court observed: "Otherwise, if a felony has been committed in the community an officer could shoot and kill an entirely innocent person, whom he might suspect of being the felon as in this case."

38. 6 Focus—Midwest, No. 40, at 12 (1968).

39. *See, e.g.*, Wimberly v. Paterson, 75 N.J. Super. 584, 183 A.2d 691 (App. Div.), *appeal denied*, 38 N.J. 340, 184 A.2d 652 (1962).

for murder or manslaughter.[40] In addition to the traditional remedies, there are also the sanctions afforded by federal civil rights legislation.[41]

A. *Civil Liability*

Substantial judgments have been entered against policemen who are quick on the draw. The Court of Appeals for the Seventh Circuit approved a $100,000 judgment against a policeman who, acting upon a description, attempted to arrest someone in a Chicago bar and, when the man violently resisted, shot him.[42] Unfortunately, for both the policeman and the victim, the man was not the suspected holdup man the police were looking for, but a visitor from Tulsa, Oklahoma—in town to marry his fiancée. Other courts have given innocent bystanders the right to recover even when they were not the immediate object of a constable's diligence, or excess thereof. Thus, in *Dyson v. Schmidt*,[43] the Supreme Court of Minnesota upheld a judgment for an assistant manager of a St. Paul theater who was shot by a detective who attempted, *inside* the theater, to capture a robbery suspect. The officers realized that the man was armed, and in fact, when they attempted to place him under arrest, he fired at them and fled. The return fire caused plaintiff's injuries. The court held that the protection the law affords a policeman who apprehends a felon can be stripped away, at least as far as innocent persons are concerned, if "the conduct of the officers created a situation which brought about the emergency."[44]

Of interest to enthusiasts of non-lethal weapons should be a pre-MACE decision by the Arizona Supreme Court.[45] The plaintiff was severely injured when shot in the face pointblank by a deputy sheriff armed with a tear gas gun. Plaintiff was arrested for disturbing the peace in a bar-restaurant, and after shooting him with the gas, the officer placed him in a lockup without rendering him any medical attention. The court affirmed a judgment by the trial court for the plaintiff.

As for civil liability predicated on federal statute, since *Monroe v. Pape*,[46] which held that 42 U.S.C. § 1983[47] supports an action by the

40. *See, e.g.*, State v. Williams, 29 N.J. 27, 148 A.2d 193 (1959).

41. *See* notes 47-59 *infra* and accompanying text.

42. Bucher v. Krause, 200 F.2d 576 (7th Cir. 1953). But for the grave injuries suffered by the "suspected felon," the case would have been a comedy of errors. Before retiring for the evening, the plaintiff was sitting at a bar in one of the city's best hotels calmly sipping an alcoholic beverage. When approached by the police, the plaintiff, believing he was about to be mugged, reached to grab his wallet. Officer Krause, acting with dispatch, then shot the plaintiff. Although it was discovered that a mistake had been made even before the plaintiff was taken to the police station (suffering all the while from a bullet in the buttock), he was told at the station by the district captain that he would still have to be "booked" for resisting arrest and would have to post a bond.

43. 260 Minn. 129, 109 N.W.2d 262 (1961).

44. *Id.* at 139, 109 N.W.2d at 268-69.

45. Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948).

46. 365 U.S. 167 (1961).

47. The statute provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected,

victim of an illegal *search* by a policeman, there can be little doubt that law enforcement officers contravene the provisions of the various civil rights enactments if they use excessive force in making an arrest. While more exhaustive discussion than is here permitted[48] would demonstrate ample grounds for civil liability under federal statute, at least one District Court has already held that § 1983 will support a complaint which alleges that a police officer shot a plaintiff without provocation or justification.[49] Noting that the plaintiff had been arrested for disorderly conduct, the court asserted: "Thus, even if it is accepted as true that plaintiff in fact was disturbing the peace, this would not authorize defendant to shoot him. It requires the citation of no authority to say that only in certain aggravated circumstances may a law enforcement officer shoot a person whom the officer is attempting to arrest or whom the officer has in his custody."[50]

B. *Criminal Responsibility*

Police officers have been convicted of murder and of manslaughter for the indiscriminate use of firearms. In affirming the imposition of a 14-year sentence on a deputy sheriff who fired a shot at what he regarded as a speeding car, after the driver failed to stop when ordered to do so, the Illinois Supreme Court declared: "[A]n officer may not use a deadly weapon to take life to effect an arrest for a misdemeanor, whether his purpose is to kill or merely to stop the other's flight. This is true, even though the offender cannot be taken otherwise."[51]

The Georgia Court of Appeals went beyond affirmance of a manslaughter conviction to state that the jury would have been authorized to convict for murder. The court declared that "no arresting officer has any right to kill a person for trying to escape in the commission of a misdemeanor."[52] The Kentucky Court of Appeals affirmed a 21-year sentence for manslaughter which was given to a deputy sheriff who shotgunned a prisoner who resisted efforts to transport him to a state mental hospital.[53] Several scuffles had ensued both in the courtroom

any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1964).

48. For a comprehensive discussion of the questions raised by federal statutes see Brest, *The Federal Government's Power To Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm*, 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1966).

49. Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966).

50. *Id.* at 904.

51. People v. Klein, 305 Ill. 141, 146-47, 137 N.E. 145, 148 (1922). One witness at the trial indicated that, after shooting, the officer declared: "When the speeders don't stop you know what they get," and "It took just one shot to get him." *Id.* at 145, 137 N.E. at 147.

52. King v. State, 91 Ga. App. 825, 828, 87 S.E.2d 434, 436 (1955). *See also* Terrell v. Commonwealth, 194 Ky. 608, 240 S.W. 81 (1922), affirming the imposition of a life sentence for a deputy sheriff who shot a moonshine bootlegger in the back to prevent his escape.

53. Rice v. Commonwealth, 288 S.W.2d 635 (Ky. Ct. App. 1956).

and outside the court building as deputy sheriffs attempted to quiet the patient, the last resulting in the shooting. The court said, "[A]n officer is never justified in killing merely to effect an arrest or prevent an escape after arrest when the offense is a misdemeanor."[54] And just this year, Supreme Court Justice Abe Fortas has warned:

> The same principles [no escape from the consequences of their conduct] apply to the police and officers of the law. They, too, are liable for their acts. The fact that they represent the state does not give them immunity from the consequences of brutality or lawlessness. . . . But they, too, are subject to the rule of law, and if they exceed the authorized bounds of firmness and self-protection and needlessly assaulted the people whom they encountered, they should be disciplined, tried, and convicted. It is a deplorable truth that because they are officers of the state they frequently escape the penalty for their lawlessness.[55]

Recent federal legislation leaves no doubt of the government's power to prosecute, under the aegis of civil rights legislation, local law enforcement authorities who forcibly, or otherwise, deprive citizens of their civil rights.[56] Shortly after Dr. King's death, the Congress amended the hitherto tepid penalties of 18 U.S.C. § 242 to read:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties . . . by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; *and if death results shall be subject to imprisonment for any term of years or for life.*[57]

While providing meaningful sanctions for violation of previous provisions of the Civil Rights Act, Congress also enacted new provisions to prevent "Interference with Federally Protected Activities."[58] In providing for a fine of not more than $10,000, or a sentence of not more than 10 years, or both, where bodily injury ensues, and life imprisonment in case of death, the recent amendments to the Civil Rights Act open new opportunities for the prosecution of law enforcement officials who, under the guise of effecting an arrest, use excessive force and cause injury to citizens engaged in "federally protected activities."[59]

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54. *Id.* at 639.

55. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 64 (1968).

56. United States v. Price, 383 U.S. 787 (1966), where the Supreme Court held that 18 U.S.C. §§ 241, 242 would support prosecution of three Mississippi law enforcement officials as well as private citizens charged with the murders of three civil rights workers in Mississippi in June 1964. *See also* Screws v. United States, 325 U.S. 91 (1945).

57. PUB. L. 90-284, § 103(b) (April 11, 1968) (emphasis added). 18 U.S.C. § 241, the conspiracy section of the Act, was also amended to provide for life imprisonment where death resulted. § 103(a) of the Act.

58. *Id.* § 101(a). The new legislation will be codified in 18 U.S.C. § 245.

59. Congress may have taken away with its left hand what it gave with its right. The

IV. Law Enforcement and the Requisites of a Humane Social Order

No just and ordered society can permit its police to become instruments of revenge or repression. The use of firearms by policemen should be subject to rigorous control, and guns should be viewed by law enforcement agencies as necessary evils designed principally for self-defense or the prevention of the most serious forcible crimes involving danger to human life. A trigger-happy and destructive police force can only serve to incite violence further, rather than to control it. The words of a Mississippi supreme court justice are as true today as when written over 50 years ago:

> The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. . . .
>
> [T]here is a custom among officers to fire their pistols when pursuing fugitives, even where they are misdemeanants, as a ruse to prevent their further flight. We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of human life.[60]

There is a contagion that force and violence breed. A law enforcement policy which stresses superiority in firepower may come to find that the cure may nourish rather than eradicate the disease. "Public brutality breeds private brutality, and private brutality breeds public brutality; regardless of which is the chicken and which the egg, the circle must be broken. The public sector cannot wait for the private sector to take the initiative."[61] The relationship between the means of controlling civil disorders and the ends of public order have been perceived by some, if not all, public officials. Thus, Mr. Justice Fortas has argued:

> In both the Negro and the youth rebellions, the critical question is one of method, of procedure. The definition of objectives and the selection of those which will triumph are of fundamental importance to the quality of our society, of our own lives, and those of our descendants. But the survival of our society as a free, open, democratic community will be determined not so much by the specific points achieved by the Negroes and the youth-generation as by the procedures—the rules of conduct, the methods, the practices—which survive the confrontations.[62]

New York Mayor John Lindsay has warned about turning "disorder

new statute talks in terms of the act not being construed so as to "deter" law enforcement officers from carrying out their "duties," and further says it does not apply to "acts or omissions" by police or National Guard troops "suppressing a riot or civil disturbance." *Id.*

60. Johnson v. Cunningham, 107 Miss. 140, 152, 65 So. 115, 118 (1914).

61. United States v. Brennan, 251 F. Supp. 99, 107 (N.D. Ohio 1966) (quoting from Collins v. Beto, 348 F.2d 823, 831-32 (5th Cir. 1965)).

62. Fortas, *supra* note 55, at 119-20.

into chaos through the unprincipled use of armed force."[63] And U.S. Attorney General Ramsey Clark called the "resort to deadly force . . . contrary to the total experience of law enforcement in this country and . . . [tending] toward a very dangerous escalation of the problems we are so intent on solving."[64]

In recognition of the imperatives of humanity, as well as effective law enforcement, the *Task Force Report on Police* of the President's Commission on Law Enforcement and the Administration of Justice formulated the following guidelines on the use of firearms:

1. Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed. The use of firearms should be flatly prohibited in the apprehension of misdemeanants, since the value of human life far outweighs the gravity of a misdemeanor.
2. Deadly force should never be used on mere suspicion that a crime, no matter how serious, was committed or that the person being pursued committed the crime. An officer should either have witnessed the crime or should have sufficient information to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissibile.
3. Officers should not be permitted to fire at felony suspects when lesser force could be used; when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force; or when there is any substantial danger to innocent bystanders. Although the requirement of using lesser force, when possible, is a legal rule, the other limitations are based on sound public policy. To risk the life of innocent persons for the purpose of apprehending a felon cannot be justified.
4. Officers should never use warning shots for any purpose. Warning shots endanger the lives of bystanders, and in addition, may prompt a suspect to return the fire. Further, officers should never fire from a moving vehicle.
5. Officers should be allowed to use any necessary force, including deadly force, to protect themselves or other persons from death or serious injury. In such cases, it is immaterial whether the attacker has committed a serious felony, a misdemeanor, or any crime at all.
6. In order to enforce firearms use, policies department regulations should require a detailed written report on all discharges of firearms. All cases should be thoroughly investigated to determine whether the use of firearms was justified under the circumstances.[65]

63. N. Y. Times, April 17, 1968, at 1, col. 2.
64. N. Y. Times, April 18, 1968, at 40, col. 3.
65. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189-90 (1967).

The guidelines of the President's Commission are irreconcilable with a blanket "shoot to kill" philosophy—mistakenly thought to be a policy of toughness, but in fact destructive of the peace and order of public life. The Federal Bureau of Investigation, not known for "softness," has also taken a stand against "shooting to kill." According to the FBI riot control manual:

> The basic rule, when applying force, is to use only the minimum force necessary to effectively control the situation. Unwarranted application of force will incite the mob to further violence, as well as kindle the seeds of resentment for police that, in turn, could cause a riot to recur. Ill-advised or excessive application of force will not only result in charges of police brutality but also may prolong the disturbance.[66]

It would appear that police administrators and the courts have presented a solid front with respect to the theory of the use of deadly force in arrests. And perhaps, in the calm aftermath of reasoned analysis, no other alternatives will appear worthy of consideration to civilized men. But one can not be sure. The politics of rioting, the incipient demands of the white community that "something be done," or the age-old feeling that "the colored have gone too far" may lead to a relaxation, if not outright repudiation, of orthodox norms governing police firearms use.

Although a change in policy by law enforcement authorities may not result in an increase in the use of deadly force in arrests, it may have a pernicious influence on the routine patrol practices and day-to-day police conduct in the black community. While many individual policemen may not interpret shoot to kill orders literally, they may either sense the mental disorganization from which such orders would necessarily emanate and take advantage of looser administrative reins to work their personal mischief, or else interpret the policy of toughness as a direction to "take off the kid gloves and crack down."[66] The ultimate tragedy then may lie in the failure of the white political structure and the larger white community to perceive that police community relations with blacks are so generally abrasive that the keys to solution lie in the search for techniques to reduce rather than increase the use of force.

Without any doubt one of the major grievances black people have in America is the relationship the black community does not enjoy with law enforcement authorities. To opt for something less than an amelioration of excessive and harsh police practices is to step closer to final solutions—solutions incompatible with American and Christian ideals, if not practices.

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66. KERNER COMMISSION REPORT 176.